UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: DEGEORGE FINANCIAL CORP., DEGEORGE CAPITAL CORP., and DEGEORGE HOME ALLIANCE, INC.	:	Bankr. No. 99-32300-02(ASD)
LOUIS MCDUFFY and BRENDA MCDUFFY, Appellants,	:	
v.	:	Civil Action No. 3:01CV0009(CFD)
ANTHONY S. NOVAK, Chapter 11 Trustee, Appellee.	:	

RULING ON BANKRUPTCY APPEAL

I. Introduction

On May 7, 1999, DeGeorge Home Alliance, Inc. and its related companies (collectively, "DeGeorge") filed voluntary petitions under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.[1] The bankruptcy case was transferred to the United States Bankruptcy Court for the District of Connecticut ("the bankruptcy court") and converted to jointly administered cases under Chapter 11. Anthony S. Novak was appointed Chapter 11 trustee.

[1]DeGeorge was known previously as Miles Home Services, Inc.

Pro se appellants Louis and Brenda McDuffy (the "McDuffys") appeal the order and the bankruptcy court's December 8, 2000 decision sustaining the Chapter 11 trustee's objection to claim number 186, disallowing that claim, and estimating its value as $0.00.[2]

II. Background

A. Underlying events

DeGeorge is a corporation engaged in the business of marketing homes and providing financing for low-income buyers. The McDuffys contacted DeGeorge about the purchase of a house on 14 Bizarre Drive in Wilmington, Delaware. (Doc. # 17, Ex. 49, Memorandum Opinion, at 2.) They allege that Kathy Meehan, a DeGeorge representative, initially gave them incorrect information regarding the house's address. They eventually inspected the house, which was in poor condition, and offered DeGeorge $20,000 as a purchase price despite numerous structural problems. DeGeorge rejected their offer and later informed them that the house had been appraised by a certified appraiser at $50,000. After some negotiation, the parties agreed on a purchase price of $45,000. In November 1991, the McDuffys bought the house and executed a purchase money mortgage to DeGeorge in the amount of $39,500. (Doc. # 17, Ex. 49, Memorandum Opinion, at 3.) The McDuffys set about repairing and renovating the house, but they encountered numerous repair problems. As a result, they later executed a second mortgage from DeGeorge in the amount of $6,062 to finance additional renovations to the house. (Id. at 4.)

[2]The decision also denied the trustee's motion to the extent that it sought expunging of the claim in its entirety. The McDuffys presumably do not appeal that portion of the decision.

B. Foreclosure actions

The McDuffys only made their mortgage payments for 18 months. They claim they stopped when they could not obtain a certificate of occupancy for the house or another mortgage company to assume the mortgage. On August 11, 1995, DeGeorge brought a mortgage foreclosure proceeding against the McDuffys in the Delaware Court of Chancery. (Id. at 5.) Attorney Bayard Allmond represented DeGeorge in this action. The McDuffys allege that there were numerous "irregularities" in this proceeding and contend that the court overlooked certain documents submitted by their attorney. The court granted DeGeorge's motion for partial summary judgment on its right to foreclose on the two mortgages, a decision later affirmed by the Delaware Supreme Court. The property eventually was sold, and the court granted DeGeorge a writ of possession, a decision again appealed by the McDuffys and affirmed by the Delaware Supreme Court.

B. Federal actions in Delaware

On the basis of these events, the McDuffys brought two lawsuits in the United States District Court for the District of Delaware. The first suit (McDuffy I), filed in 1996, was against Miles Homes Services, Inc., and Attorney Allmond. In that case, the McDuffys alleged violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq. United States District Judge Sue L. Robinson granted the defendants' motion for summary judgment, a decision which is on appeal to the Third Circuit. (Doc. # 6, Ex. 17, Memorandum Order.) The McDuffys brought a second action also assigned to Judge Robinson ("McDuffy II") in 1999 against DeGeorge, Allard, John Benge (another DeGeorge attorney), and several Delaware judicial officials involved in the state foreclosure action. In that case, the McDuffys alleged civil rights

violations under 42 U.S.C. §§ 1981, 1982, 1983, and 1985, as well as violations of RICO and the FDCPA. (Doc. # 15, Ex. A, McDuffy II Complaint.)

In a memorandum opinion dated March 31, 2000, Judge Robinson granted the judicial defendants' motions to dismiss and granted Allmond's motion to dismiss with respect to the claims under 42 U.S.C. §§ 1982 and 1983, RICO, and the FDCPA in McDuffy II. (Doc. # 17, Ex. 49, Memorandum Opinion.) The court also denied DeGeorge's motion for a more definite statement without prejudice to renew and stayed the claims against DeGeorge as a result of its bankruptcy filing. (Id. at 1-2 n.2.)

C. Connecticut bankruptcy case

DeGeorge's Delaware Chapter 7 bankruptcy was transferred to the District of Connecticut and converted to jointly administered cases under Chapter 11. On February 28, 2000, the McDuffys filed proof of claim number 186 in the bankruptcy court. (Doc. # 17, Ex. 39, United States Bankruptcy Court for the District of Connecticut Proof of Claim.) They asserted a mixed secured and unsecured priority claim, which they have valued at different times to be worth $20 million and $62 million. (Id.; Doc. # 17, Ex. 45, Memorandum of Law.) The claim is based primarily on the McDuffys' allegations in McDuffy II. (Doc. # 12, Ex. P, Statement of the Case, at 2 ¶ 2; Doc. #15, Ex. D, "Notice of Motion to Estimate Claims of Louis and Brenda McDuffy," at 4.) In general terms, the McDuffys allege that DeGeorge engaged in racial discrimination by selling them a house with known structural problems and then foreclosing on their two mortgages through the use of fraudulent documents and other "underhanded tactics." In addition, the Notice of Motion of Estimate contains allegations that DeGeorge acted in concert with a "White drug lord" to intimidate the residents of the McDuffys' neighborhood, convince municipal authorities

not to provide certain services to the neighborhood, and contaminate the surrounding environment. (Doc. # 15, Ex. D, "Notice of Motion to Estimate Claim of Louis and Brenda McDuffy," at 5-6.)[3] The McDuffys also maintain that the unidentified drug lord "converted the lowest crime area in the state of Delaware which was ninety-five percent African-American to practically the highest in the county of the state, according to the police, through this method of what we call 'Social Profiling.'" (Id.)

On September 5, 2000, the trustee filed an objection to claim 186 and requested that it be disallowed. (Doc. # 12, Ex. OOO, "Chapter 11 Trustee's Objection Under 11 U.S.C. § 502(b) and Federal Rule of Bankruptcy Procedure 3007 to Proof of Claim 186 Filed by Louis & Brenda McDuffy.") After entry of a pretrial order, (Doc. # 17, Ex. 43, Pretrial Order), the bankruptcy court held a one-day trial on November 21, 2000 on the trustee's objection. The bankruptcy court issued an oral decision on November 28, 2000 stating that the McDuffys had not met their burden of proof on their claim, estimating the value of the claim at $0.00, but denying the trustee's motion to expunge the claim in its entirety. (Doc. # 17, Ex. 40., Tr. of Nov. 28, 2000 Hearing, at 20-22).

After reviewing the evidence, the bankruptcy court concluded that "[t]he problem with this disturbing tale told by the McDuffies [sic] in view of the evidence that was presented in this Court is that it is a totally fictionalized tale." (Id. at 18.) The Court concluded that the McDuffys had presented no credible evidence that would establish race-based discrimination or an intent to discriminate to support a § 1981 claim, and that there was "no credible evidence of racial or class

[3]The McDuffys also filed a motion for relief from the automatic bankruptcy stay. The bankruptcy court granted that order only with respect to the McDuffys' appeals in the Delaware Supreme Court, not their claims in McDuffy II.

based discrimination or a related conspiracy motivated by the same" to support the § 1985 claim. (Id. at 18-19.) The court also found no evidence that a defendant was acting under color of state law, a requirement of the § 1983 count. (Id. at 19.) In addition, the court found no pattern of activity or threat of continued activity to support a RICO count. (Id.) Finally, the court held that there was no evidence to support a FDCPA claim.[4] (Id. at 19-20.) In short, the bankruptcy court concluded, "I envision and see about as much chance of Mr. McDuffy prevailing – Mr. and/or Mrs. McDuffy prevailing on this claim in the Delaware court in McDuffy Two as I would if I were to attempt to nail a drop of water to a wall." (Id. at 20.) The court further stated:

> I estimate the probability of this claim being sustainable at being zero of at being so close to zero that for purposes of this Court's obligation to estimate a claim, it needs to be estimated at that amount.
>
> Consequently, I'm estimating Claim Number 186 for purposes of voting in the context of this bankruptcy case with no implications beyond that at the present time in the amount of zero dollars.
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> Now, implicit, implicit in this ruling and estimation of Claim 186 at zero, which I now make explicit, is the Court's denial of the Trustee's motion to expunge the claim in its entirety, which I do not believe is appropriate under the circumstances before me.
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> In summary, then, the objection of the Trustee is sustained in all respects except that I decline to expunge the claim in its entirety. More specifically and definitively, the Claim Number 186 is estimated at zero dollars.

(Id. at 21-22.)

After both parties submitted motions essentially requesting reconsideration, the bankruptcy court issued a written order on December 8, 2000 sustaining the trustee's objection,

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[4]The Court stated that this conclusion assumed that the claim had not already been adjudicated by Judge Robinson in McDuffy II.

disallowing the proof of claim, estimating the value of the claim at $0.00.[5] (Id., Ex. 41, "Order on Trustee's Objection to Claim No. 186 and On Motions of Louis and Brenda McDuffy and Residential Funding Corporation to Estimate Claim 186.")

D. Issues on Appeal

The Statement of Issues attached to the McDuffy's "Designation of Contents of Record and Statement of Issues" [Doc. #5] contains twenty five issues on appeal, though many of the questions overlap. Accordingly, the Court has grouped the issues into five topical categories: (1) jurisdictional issues, (2) substantive errors, (3) procedural errors, (4) issues related to the trustee's performance of his duties, and (5) issues related to the McDuffys' motion for reargument.

III. Standard of Review

A district court has jurisdiction to decide appeals of final orders of the bankruptcy courts under 28 U.S.C. § 158(a). The factual findings of the bankruptcy court are reviewed by the district court for clear error, and the conclusions of law are reviewed de novo. See Fed. R. Bankr. P. 8013; National Union Fire Ins. Co. v. Bonnanzio (In re Bonnanzio), 91 F.3d 296, 300 (2d Cir. 1996). A district court may "affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings." Fed. R. Bankr. P. 8013.

IV. Discussion

A. Bankruptcy procedure

A "claim" is defined as follows:

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[5]DeGeorge withdrew its motion for reconsideration; the court denied the McDuffy's "Motion for Reargument, or in the Alternative Motion for a New Trial/Hearing, or in the Alternative and Preferred Lifting of the Automatic Stay and Transferring the Case Back to United States District Court of Delaware," (Doc. #12, Ex. AAA), in a December 8, 2000 endorsement ruling (Doc. #17, Ex. 42).

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

The purpose of filing a proof of claim is to share in any distribution of the bankruptcy estate. See Fed. R. Bankr. P. 3002(a); In re 183 Lorraine St. Assocs., 198 B.R. 16, 26 (E.D.N.Y. 1996). The holder of a claim against the debtor may participate in the distribution of the debtor's estate only if the claim is "allowed." The filing of a proof of claim is prima facie evidence of that claim, if properly executed and filed, and the claim is deemed allowed unless an objection is raised. See 11 U.S.C. § 502(a); Fed. R. Bankr. P. 3001(f). The objection must be filed by a party in interest, see 11 U.S.C. § 502(a), and a trustee may file such objections. See 11 U.S.C. § 704(5).

The filing a proof of claim is prima facie evidence of that claim and thus the "interposition of an objection does not deprive the proof of claim of presumptive validity unless the objection is supported by substantial evidence." In re Hemingway Transp., Inc., 993 F.2d 915, 925 (1st Cir. 1993). When a party objects, he carries the burden of going forward with the evidence concerning the validity of the claim. See In re Allegheny Int'l, Inc., 954 F.2d 167, 173 (3d Cir. 1992). Specific grounds for objections are included in 11 U.S.C. § 502(b). Most relevant here is § 502(b)(1), which provides that the trustee may object to a claim on the basis of defenses that would be available to the debtor. If the trustee succeeds in overcoming the prima facie effect of filing the proof of claim, the ultimate burden is on the claimant to prove the validity of the claim

by a preponderance of the evidence. Id.

When an objection is made, the bankruptcy court must determine, after notice and hearing, the amount of the claim at the time the bankruptcy petition was filed. 11 U.S.C. § 502(b). As to unliquidated claims, a court may estimate the amount of a contingent or unliquidated claim when actual litigation of the claim would unduly delay administration of the case. Id. at § 502(c). Courts have wide discretion in choosing a mechanism for valuing a claim. See In re Windsor Plumbing Supply Co., 170 B.R. 503, 520 (Bankr. E.D.N.Y. 1994). The Second Circuit has held that courts should make a "speedy and rough estimation of [the] claims for purposes of determining [claimant's] voice in the Chapter 11 proceedings . . . ." In re Chateaugay Corp., 944 F.2d 997, 1006 (2d Cir.1991).

B. Jurisdictional issues

The Court first will address the McDuffys' jurisdictional argument, as it affects the authority of the bankruptcy court to issue the order from which the McDuffys appeal. The McDuffys argue that the adjudication of their claim is a non-core matter, and they maintain that the bankruptcy court lacked the authority to take any action except transfer the claim to the United States District Court for the District of Delaware for a six week jury trial before Judge Robinson.

> The Bankruptcy Code divides claims in bankruptcy proceedings into the categories "core" and "non-core" (or "related"). In re Manville Forest Prods. Corp., 896 F.2d 1384, 1389 (2d Cir.1990). Bankruptcy judges have the authority to "hear and determine all . . . core proceedings arising under title 11 . . . and may enter appropriate orders and judgments, subject to review under section 158 of [title 28]." 28 U.S.C. § 157(b)(1). With respect to non-core claims, unless the parties consent, the bankruptcy court can only make recommended findings of fact and conclusions of law which are subject to de novo review in the district court. 28 U.S.C. §§ 157(c)(1) and (2).

In re S.G. Phillips Constructors, Inc., 45 F.3d 702, 704 (2d Cir. 1995). The decision to allow or disallow a claim is considered a "core proceeding" under 28 U.S.C. § 157(b)(2)(B). "[B]y filing a claim against a bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power.'" Langenkamp v. Culp, 498 U.S. 42, 44 (1991) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58-59 and n.14 (1989); see also 4 Collier on Bankruptcy, ¶ 501.01[2][d] (explaining that creditors who file claims "submit themselves to the substantive jurisdiction of the bankruptcy court"). Thus, the filing of a proof of claim may be the determinative factor in determining the bankruptcy court's jurisdiction, even when it was filed before the bankruptcy petition, as here. In re S.G. Phillips Constructors, 45 F.3d at 705. While the United States Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co. held that Article III of the Constitution prohibited a bankruptcy court from adjudicating a prepetition claim by the debtor, 458 U.S. 50, 60 (1982), "[s]ince then, both the Supreme Court and [the Second Circuit] have concluded that the Marathon holding was a narrow one and have broadly construed the jurisdictional grant in the 1984 Bankruptcy Amendments." Id. at 705. Therefore, the bankruptcy court was within its authority to render its decision.[6]

[6]Somewhat related to this question on appeal is the McDuffys' argument that DeGeorge chose to litigate the bankruptcy case in the District of Connecticut in order to disadvantage the McDuffys, who were required to travel from Delaware to attend the bankruptcy court proceedings. The McDuffys do not appear to have briefed this "forum shopping" allegation, and there is no indication from the record on appeal that DeGeorge was engaged in such an activity.

C. Substantive errors

1. Preclusion doctrines

The McDuffys argue that by disallowing their claim against DeGeorge and valuing that claim at $0.00, the bankruptcy court improperly failed to follow Judge Robinson's memorandum decision in McDuffy II. In that opinion, Judge Robinson granted the judicial defendants' motions to dismiss and granted Allmond's motion to dismiss with respect to the claims under 42 U.S.C. §§ 1982 and 1983, RICO, and the FDCPA, but not with respect to the remaining claims; and denied DeGeorge's motion for a more definite statement without prejudice to renew, and stayed the claims against DeGeorge as a result of its bankruptcy filing. They maintain that Judge Robinson's determinations are the law of the case and have preclusive effect under the doctrines of res judicata and collateral estoppel. In response, the trustee argues that these issues were not properly raised in the bankruptcy court, and even if they had been properly raised, res judicata and collateral estoppel are inapplicable here.

> Although an appellate court retains discretion to decide questions not initially raised in the proceedings below, In re Firstcent Shopping Ctr., 141 B.R. 546, 551 n. 8 (S.D.N.Y. 1992); In re Hilsen, 119 B.R. 435, 439 (S.D.N.Y. 1990), the general rule is that an appellate court will not consider an issue not passed upon below unless failure to entertain the issue will result in a manifest injustice. In re Lionel Corp., 29 F.3d 88, 92 (2d Cir. 1994), citing Singleton v. Wulff, 428 U.S. 106, 120 (1976). Moreover, a manifest injustice will not occur when the moving party has other means by which it can obtain a successful result. Lionel, 29 F.3d at 92.

In re Macrose Indus. Corp., 186 B.R. 789, 802 (E.D.N.Y. 1995). In their "Statement of the Case," (Doc. # 12, Ex. PPP, at 2, 10-11; Doc. # 17, Ex. 44, at 2, 10-11), the McDuffys discuss Judge Robinson's ruling and argue that her factual findings are the authority on which their proof of claim is based. (See also Doc. # 15, Ex. D, "Notice of Motion to Estimate Claim of Louis and

Brenda McDuffy," at 12.) While they did not specifically reference any of the preclusion doctrines, given that the McDuffys are proceeding pro se, the Court concludes that they adequately raised these issues below.[7]

Nevertheless, neither the law of the case doctrine nor the preclusion doctrines are applicable here.[8] The law of the case doctrine "posits that if a court decides a rule of law, that decision should continue to govern in subsequent stages of the same case." Sagendorf-Teal v. County of Rensselaer, 100 F.3d 270, 277 (2d Cir.1996) (internal quotations omitted). To the extent that Judge Robinson's decision constituted a rule of law, it was not in the context of the same case. Instead, the disallowance and valuation was part of a bankruptcy proceeding. In addition, Judge Robinson's ruling is not a decision on a rule of law for the purposes of the law of the case doctrine. As to DeGeorge, she merely denied its motion to dismiss without prejudice to renew, in light of the bankruptcy filing. Further, while Judge Robinson determined that the McDuffys stated a claim against Attorney Allard under § 1981, § 1985, and RICO, she did not reach the merits of those contentions.

The McDuffys' res judicata argument similarly fails. Under the doctrine of res judicata, or claim preclusion, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). "Said differently, 'upon a final judgment

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[7]Although the bankruptcy court referred to the factual scenario described in Judge Robinson's opinion, it did not state that it was relying upon the decision for any preclusive effect.

[8]The McDuffys argue with respect to several of their claims that the court should apply Delaware and Third Circuit law. Because the federal law applicable in this case is the same in the Second and Third Circuit, the Court concludes that any distinction between the law of each circuit would make no difference on the outcome of the case.

on the merits, parties to a suit are barred[ ] as to every matter that was offered and received to sustain or defeat a cause of action, as well as to any other matter that the parties had a full and fair opportunity to offer for that purpose.'" Bank of India v. Trendi Sportswear, Inc., 239 F.3d 428, 439 (2d Cir. 2000) (quoting Manhattan Eye Ear & Throat Hosp. v. NLRB, 942 F.2d 151, 155-56 (2d Cir.1992)); see also Joe's Pizza, Inc. v. Aetna Life & Casualty Co., 675 A.2d 441, 446 (Conn. 1996) (explaining that "the appropriate inquiry . . . is whether the party had an adequate opportunity to litigate the matter in the earlier proceeding"). Judge Robinson's decision denying DeGeorge's motion to dismiss without prejudice due to the pendency of the bankruptcy case is not a final decision on the merits.[9] See City of Mt. Clemens v. United States Envtl. Prot. Agency, 917 F.2d 908, 915 n.6 (6th Cir. 1990) ("[A] denial of a motion to dismiss is not the type of judgment that is given res judicata effect."); see also 18 Moore's Federal Practice & Procedure (3d ed.) § 131.54[1] ("A dismissal of an action *without prejudice* is an indication that the judgment is not on the merits and will therefore have no preclusive effect."). Instead, Judge Robinson merely acknowledged that she lacked the authority to take further action on the claims directed at DeGeorge because of the automatic bankruptcy stay. Further, with respect to the claims against Attorney Allard, in denying his motion to dismiss in part, Judge Robinson determined that the McDuffys had stated a claim under § 1981, § 1985, and RICO. She did not

[9]The McDuffys repeatedly state that Judge Robinson's opinion with respect to the civil rights and RICO claims pertained to a motion for summary judgment and cite to authority indicating that a grant of summary judgment is a final decision on the merits. Judge Robinson's decision, however, related to several motions to dismiss, and thus that authority is inapplicable here.

reach the merits of those claims.[10]

As to collateral estoppel, this doctrine "applies when (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was [a] full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." Epperson v. Entertainment Express, Inc., 242 F.3d 100, 108 (2d Cir. 2001) (quoting United States v. Hussein, 178 F.3d 125, 129 (2d Cir.1999) (internal quotation marks and citation omitted)). Again, Judge Robinson's decision with respect to the motions to dismiss filed by DeGeorge and Attorney Allard does not constitute a valid and final judgment on the merits. See McGuire, Cornwell & Blakey v. Grider, 765 F. Supp. 1048, 1052 (D. Colo. 1991) (holding that under Oklahoma law denials of motions to dismiss are not final judgments on the merits for the purposes of issue preclusion). Therefore, the doctrine of collateral estoppel is inapplicable.[11]

2. Civil rights claims[12]

The McDuffys argue that the bankruptcy court applied incorrect law when evaluating its

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[10]Given that it is clear that Judge Robinson's opinion was not a final decision on the merits, the Court will not address whether Attorney Allard can be considered as being in privity with DeGeorge for the purposes of the application of the preclusion doctrines.

[11]The Court does not reach the issue of whether the other requirements of collateral estoppel are satisfied.

[12]Somewhat confusing is the bankruptcy court's statement that the McDuffys present "a totally fictionalized tale." (Id. at 18.) This statement could imply that the bankruptcy court concluded that *none* of the evidence presented by the McDuffys was credible. However, it appears that the bankruptcy court was not referring to the evidence in the totality, as the court incorporated by reference the procedural underpinnings and factual description of the mortgage set forth by the trustee. Instead, the bankruptcy court appears to have been referring to the McDuffys' civil rights, RICO and FDCPA allegations as "totally fictionalized." (See id. at 14, l.4–18, l.18.)

claim and that its decision was not supported by substantial evidence. They also maintain that the bankruptcy court overlooked certain evidence of racial animus.

To prove a claim under § 1981, a plaintiff must show: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate based on the race by the defendant; and (3) "the discrimination concerned one or more of the activities enumerated in the statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.)." Mian v. Donaldson, Lukin & Jenrette Sec. Corp., 7 F.3d 1085, 1087. To prove a conspiracy under § 1985(2), a plaintiff must show "that he was a member of a protected class, that the defendants conspired to deprive him of his constitutional rights, that the defendants acted with class-based, invidiously discriminatory animus, and that he suffered damages as a result of the defendants' actions." Gleason v. McBride, 869 F.2d 688, 694-95 (2d Cir. 1989). The bankruptcy court appears to have correctly stated the pertinent elements of these claims, (Doc. # 17, Ex. 40, Tr. of Nov. 28, 2000 hearing, at 16.) The record shows that as support for the racial animus required under § 1981 and § 1985, the McDuffys contend that a contractor named Larry Moore employed by DeGeorge was offered the house at 14 Bizarre Drive for half the price offered to the McDuffys.[13] They referred to the same incident in oral argument before this Court. They also contend that the fact that Kathy Meehan, a DeGeorge representative, initially gave them the incorrect address of the house on Bizarre Drive is evidence that DeGeorge refused to deal with African Americans. (Doc. #12, Ex. PPP, at ¶ 147.) Further, although their argument is not entirely clear, it appears that they also maintain that the alleged fraud committed by DeGeorge in the foreclosure proceedings in Delaware state court

[13]The bankruptcy court specifically asked Mr. McDuffy about this issue in his closing argument. (Doc. # 12, Ex. DDD, Tr. of Nov. 21, 2000, at 144-45.) Mr. McDuffy referred the court to Exhibit A, which is the 56 page "report," or complaint, in McDuffy II.

is attributable to the claim that the State of Delaware prohibits African Americans from being admitted to the bar. (Id. at ¶ 84.) While the McDuffys' allegations of racial animus and intent to discriminate are far-reaching, they have not produced evidence to support them. Therefore, the bankruptcy court's determination that their claims under § 1981 and § 1985 were insufficient was not clearly erroneous.

As to the McDuffys' § 1983 claim against DeGeorge, the bankruptcy court concluded that there was no credible evidence that DeGeorge was acting under color of state law. (Doc. # 17, Ex. 40, Tr. of Nov. 28, 2000 hearing, at 19.) "To state a claim under § 1983, a plaintiff must allege that (1) the challenged conduct was attributable at least in part to a person who was acting under color of state law and (2) the conduct deprived the plaintiff of a right guaranteed under the Constitution of the United States." Snider v. Dylag, 188 F.3d 51, 53 (2d Cir.1999); see also Dwares v. City of New York, 985 F.2d 94, 98 (2d Cir.1993). "[T]he 'under color' of law requirement has consistently been viewed in the same manner as the 'state action' requirement under the Fourteenth Amendment." Annunziato v. The Gan, Inc., 744 F.2d 244, 249 (2d Cir. 1984). The only way DeGeorge could be considered a state actor is through some alleged collaboration with Delaware state court officials in the foreclosure proceedings in the Chancery Court. However, this Court also finds no evidence presented by the McDuffys that DeGeorge acted under color of state law in that way.

Thus, the bankruptcy court's conclusion with respect to this element of § 1983 and the other civil rights causes of action was not clearly erroneous.

3. RICO claim

As to the McDuffys' RICO claims, the bankruptcy court concluded that there was not

evidence of a pattern of activity required for a RICO claim. (Doc. # 17, Ex. 40, Tr. of Nov. 28, 2000 hearing, at 19.) Under 18 U.S.C. § 1962(b), it is unlawful "for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Thus,

> To establish a civil RICO claim, plaintiff must plead (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). A pattern of racketeering activity requires the commission within a ten year period of at least two predicate acts that violate laws listed in 19 U.S.C. § 1961(1); these acts must be related and must amount to, or threaten the continued likelihood of, continued criminal activity. H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989).
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> Section 1961(1) of Title 18 defines "racketeering activity" to include, inter alia, violations of federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. See O'Malley v. New York Transit Authority, 896 F.2d 704, 706 (2d Cir. 1990) ("To be guilty of mail or wire fraud, defendants must have used the mail or wires as a means to obtain money or property by means of false or fraudulent pretenses, representations, or promises or for purposes of executing a scheme to defraud."). Therefore, each allegation of a predicate act must meet Rule 9(b)'s standards for particularity.

Atlantic Gypsum Co. v. Lloyds Int'l Corp., 753 F. Supp. 505, 511 (S.D.N.Y. 1990) (citations omitted). The McDuffys appear to rely on Kathy Meehan's representations to Brenda McDuffy regarding the address of the Bizarre Drive house, as well as Meehan's contention that a certified appraiser had valued the house at $50,000, as evidence of violation of the wire and mail fraud statutes. (Doc. #12, Ex. DDD. Statement of the Case, at 6; Id., Ex. DDD, Brenda McDuffy Testimony, at 47-49, 54-59). This evidence is not sufficient to support a claim under RICO because it does not indicate a pattern of racketeering activity through the violation of the wire and mail fraud statutes. In particular, it does not support the notion that DeGeorge used the wires or

mail to obtain money or property by means of false or fraudulent pretenses, or for purposes of executing a scheme to defraud. Thus, the bankruptcy court's conclusions were not clearly erroneous.

4. Fair Debt Collection Practices Act claim

Finally, the bankruptcy court found that there was not sufficient evidence to support a claim under the FDCPA.[14] (Doc. # 17, Ex. 40, Tr. of Nov. 28, 2000 hearing, at 19-20.) "The FDCPA is designed to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. § 1692. The FDCPA applies only to the actions of "debt collectors," defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). However, the FDCPA excludes entities attempting to collect debts owing *to them* from the definition of debt collector as long as the collector does not use a name that might lead a debtor to believe a third party had become involved in the collection effort. Id.; see also Maguire v. Citicorp Retail Serv., Inc., 147 F.3d 232, 235 (2d Cir.1998). Here, there is no evidence that DeGeorge attempted to collect its debts from the McDuffys in any other name but its own. Consequently, the FDCPA claim also must fail.

[14]In so doing, the bankruptcy court also noted that although it was not relying upon it, it referred to Judge Robinson's grant of summary judgment in McDuffy I based on the fact that DeGeorge was not a debt collector within the meaning of the Act. (Doc. # 17, Ex. 40, Tr. of Nov. 28, 2000 hearing, at 20.)

D. Procedural errors

1. Burdens and presentation of evidence at trial

The McDuffys argue that the bankruptcy court's decision to begin the one-day trial with their presentation of evidence was erroneous and deprived them of due process by placing the burden of proof on them. The trustee maintains that the parties waived the initial step in a proof of claim proceeding, which the trustee contends is commonly done. As explained above, when a party objects to a claim, he carries the burden of going forward with the evidence concerning the validity of the claim. See In re Allegheny, 954 F.2d at 173. If the trustee succeeds in overcoming the prima facie effect of filing the proof of claim, the ultimate burden is on the claimant to prove the validity of the claim by a preponderance of the evidence. Id. Despite these burdens, the parties in their pretrial order agreed to a trial sequence beginning with the McDuffys' seeking to prove the validity of their claim. (Doc. # 17, Ex. 43, Pretrial Order, at 4.) The McDuffys did not file any objections to this pretrial order, and thus they cannot maintain this argument here.[15] Further, there is no indication from the transcripts that the bankruptcy court improperly placed a greater burden on the McDuffys than was warranted; the McDuffys bore the ultimate burden as to allowance of the claim at issue.

2. Estimation procedure

The McDuffys also object to the procedure used by the bankruptcy court to estimate their claim, arguing that it violated their due process rights. In support of their argument they cite In re Windsor Plumbing Supply Co., where the court discussed the estimation process. See 170 B.R.

[15]The parties also apparently agreed to dispense with opening arguments. Although Mr. McDuffy appeared to begin to object to this at the start of evidence, he then stated that he would "stick to what we agreed to." (Doc. # 12, Ex. DDD, Tr. of Nov. 21, 2000, at 16-17.)

503 (Bankr. E.D.N.Y. 1994). The court explained,

> 11 U.S.C. § 502(c)(1) provides in relevant part:
>
> > There shall be estimated for purpose of allowance under this section--
> > (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be would unduly delay the administration of the case . . .
>
> Neither the Code nor the Federal Rules of Bankruptcy Procedure provide any procedures or guidelines for estimation. However, courts addressing the issue have held that bankruptcy judges may use "whatever method is best suited to the particular contingencies at issue." Bittner v. Borne Chemical Co., 691 F.2d 134, 135 (3d Cir.1982); See In re Baldwin-United Corp., 55 B.R. 885, 899 (Bankr. S.D. Ohio 1985). Judges must therefore fashion their own procedures. In re MacDonald, 128 B.R. 161 (Bankr. W.D. Tex. 1991). In doing so, the Court is bound only by "the legal rules which may govern the ultimate value of the claim . . . [and] those general principles which should inform all decisions made pursuant to the Code." Bittner, 691 F.2d at 135-36.
>
> Bankruptcy courts have wide discretion in choosing the process for estimating a claim. The methods used by courts have run the gamut from summary trials (Baldwin, 55 B.R. at 899) to full-blown evidentiary hearings (In re Nova Real Estate Inv. Trust, 23 B.R. 62, 65 (Bankr. E.D. Va.1982)) to a mere review of pleadings, briefs, and a one-day hearing involving oral argument of counsel. In re Lane, 68 B.R. 609, 613 (Bankr. D. Hi. 1986). Whatever the procedure the court chooses to estimate a claim, it must be consistent with the policy underlying Chapter 11, that a "reorganization must be accomplished quickly and efficiently." Bittner, 691 F.2d at 137 citing 124 Cong. Rec. H 11101-H 11102 (daily ed. Sept. 28, 1978). It may be sometimes be inappropriate to hold time-consuming proceedings which would defeat the very purpose of 11 U.S.C. § 502(c)(1) to avoid undue delay.
>
> . . .
>
> In determining exactly how to estimate the value of a claim, the bankruptcy court has broad discretion. The Court of Appeals for the Second Circuit has stated that courts should make a "speedy and rough estimation of [the] claims for purposes of determining [claimant's] voice in the Chapter 11 proceedings . . ." In re Chateaugay Corp., 944 F.2d 997, 1006 (2d Cir.1991). The Second Circuit's requirement for a "rough estimation" of the claim is in accordance with the view of other jurisdictions that:

> [a]n estimate necessarily implies no certainty; it is not a finding or a fixing of an exact amount. It is merely the court's best estimate for the purpose of permitting the case to go forward and thus not unduly delaying the matter. In re Nova, 23 B.R. at 66.

> In actually estimating the value of a claim, many courts have taken a binary approach; all or nothing. The party that carries its argument by a preponderance generally receives either a claim value of zero if the debtor prevails, or the full value of the claim if the claimant prevails. . . . While such approach may be appropriate for a finder of fact, we do not believe that it is appropriate for a claim estimation proceeding. A trier of fact first determines which version is most probable and proceeds from there to determine an award in a fixed amount. An estimator of claims must take into account the likelihood that each party's version might or might not be accepted by a trier of fact. The estimated value of a claim is then the amount of the claim diminished by probability that it may be sustainable only in part or not at all.

In re Windsor Plumbing Supply Co., 170 B.R. at 520.

In this case, the one-day trial involved the trustee's objection to the McDuffys' claim. According to the pretrial order, "[t]he motions to estimate shall be included as part of the trial, if necessary, without waiving the rights of the Creditors' Committee to challenge the validity of those motions." (Doc. # 17, Ex. 43, Pretrial Order, at 3.) The Court concludes that the bankruptcy court did not exceed its discretion in following this procedure. While the McDuffys argue that their claim should have been properly resolved in a six week trial, such a lengthy proceeding is not consistent with the purpose of § 502(b).[16] Further, the McDuffys agreed to the one-day procedure in the pretrial order. (Doc. # 17, Ex. 43, Pretrial Order, at 4.)

3. Set off argument

> The right of setoff (also called "offset") allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the "absurdity of

[16]To the extent that the McDuffys argue that the bankruptcy court erred by using an "all-or-nothing" approach, the Court finds this argument without merit because there is no indication from the record that the bankruptcy court followed such an approach.

> making A pay B when B owes A." . . . . Although no federal right of setoff is created by the Bankruptcy Code, 11 U.S.C. § 553(a) provides that, with certain exceptions, whatever right of setoff otherwise exists is preserved in bankruptcy.

Citizens Bank v. Strumpf, 516 U.S. 16, 18 (1995) (citation omitted).[17] The McDuffys argue that the bankruptcy court erred in its consideration of their argument that they were entitled to a setoff. The trustee argues that this issue was not properly before the bankruptcy court.

The McDuffys apparently first raised this issue in an August 31, 2000 submission to the bankruptcy court. (Doc. # 15, Ex. E, "Creditors Louis and Brenda McDuffy, Husband and Wife, Do Respectfully Reject the Plan by RFC and the Creditors Committee and in Its Place Submit Their Enclosed Plan of Reorganization," at 49-50.) They also brought the issue to the bankruptcy court's attention at the time of the November 28, 2000 oral decision on the trustee's objection. At that time, the bankruptcy court inquired as to whether DeGeorge was still attempting to collect money from the McDuffys, and the attorney for the trustee represented that he was fairly certain that no collection activities were continuing. (Doc. # 17, Ex. 10, Tr. of Nov. 28, 2000 Hearing, at 25-26.) The following exchange then occurred:

> The Court: All right. Mr. McDuffy, is that, in fact, your concern?
>
> Mr. McDuffy: Yes, it was, your honor.

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[17]Under 11 U.S.C. § 553,

> (a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that--
> (1) the claim of such creditor against the debtor is disallowed;

11 U.S.C. § 553.

The Court: Well, why don't we give time for that to play out? It may very well work out in your favor without further intervention by the Court.

Mr. McDuffy: All right, sir. Thank you.

The Court: All right?

Mr. McDuffy: Okay.

The Court: All right. Court stands adjourned.

(Id. at 26.) Thus, based on the trustee's representation, the bankruptcy court apparently determined there was no need for it to make a determination regarding setoff. The McDuffys now claim that the trustee's attorney sent them a letter indicating that DeGeorge would cease collection activity only if they agreed to abandon the Delaware litigation.[18] (Doc. # 12, Ex. FFF, Letter of Dec. 1, 2000.)

The Court concludes, particularly in light of the McDuffys' pro se status, that the setoff issue was before the bankruptcy court. The bankruptcy court, however, did not rule on the issue. Instead, Mr. McDuffy agreed to attempt to resolve the issue without the intervention of the court. Therefore, there is no bankruptcy court decision for this Court to review. Further, even if the bankruptcy court had considered the issue on its merits, it appears that no setoff would be permitted under 11 U.S.C. § 553(a)(1), which prohibits setoffs when a creditor's claim against the debtor is disallowed.

5. McDuffys' litigation burdens

The McDuffys also maintain that they were improperly burdened by the fact they were forced to travel to Connecticut to participate in the bankruptcy proceedings. However, by filing a

[18]While they indicate that this letter is Ex. III, no letter was included under that designation.

claim, creditors "submit themselves to the substantive jurisdiction of the bankruptcy court." See 4 Collier on Bankruptcy, ¶ 501.01[2][d]. Therefore, it was not unduly burdensome for the McDuffys to travel to Connecticut.

E. Alleged conflict of interest of trustee

The McDuffys argue that the trustee did not fulfill his duty to act impartially. In particular, they contend that "[i]t was therefore a conflict of interest, both legally and on the face of it by appearance, for the Trustee to co-mingle and represent Bayard Allmond, John Benge, and the other Defendants who are adversaries of the McDuffys, while by law mandated to act on the rightful behalf of the McDuffys." (Doc. # 12, "Brief in Support of the McDuffys Appeal from Trial and Verdict Found by the Honorable Dabrowski Bankruptcy Judge for Connecticut," at 35.) In support, they cite to the settlement letter in which the attorney for the trustee states that DeGeorge will cease collection activities if the McDuffys withdraw their various suits. (Doc. # 12, Ex. FFF.) However, the McDuffys present no evidence that the conflict of interest issue was raised before the bankruptcy court. This Court, when deciding appeals, only has the authority to hear appeals from "final judgments, orders, and decrees," certain interlocutory orders, and with leave of court, from other interlocutory orders. 28 U.S.C. § 158. The conflict of interest issue is not the subject of any bankruptcy court rulings from which the McDuffys appeal. Therefore, this Court is without appellate jurisdiction to consider this point.

F. Denial of motion for reargument, new trial, stay, and transfer

1. Reargument

The McDuffys contend that the bankruptcy court abused its discretion in denying their motion for reargument (Doc. # 12, Ex. AAA), which included claims that the trustee violated

their due process rights.[19] The bankruptcy court denied the McDuffys' motion for rehearing, a new trial, transfer, and stay. The copy of the endorsement provided to the Court, however, is not legible in its entirety. The portion of the endorsement that the Court is able to read states, "No 'new evidence' presented or alleged, or necessity to remedy an 'error of law' or to prevent an 'injustice,' as alleged, see Motion at page 14, and there is no reason or basis in law or fact for the Court to reconsider its Ruling." (Doc. # 17, Ex. 42.) Thus, it appears that the bankruptcy court treated the motion as a motion for reconsideration. Denial of a motion for reconsideration is reviewed for abuse of discretion. See Devlin v. Transportation Communications Int'l Union, 175 F.3d 121, 132 (2d Cir. 1999).

However, several statutory provisions could govern the McDuffys' motion. Bankruptcy Rule 9023, which pertains to motions for new trials and for amendment of judgments, incorporates Rule 59 of the Federal Rules of Civil Procedure, except as provided in Bankruptcy Rule 3008. Thus, in general, "[a] motion to rehear or reconsider will be construed as a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e)." In re Crozier Bros., Inc., 60 B.R. 683, 687 (S.D.N.Y.1986). Rule 59 provides, in relevant part:

> (a) Grounds. A new trial may be granted to all or any of the parties on all or part of the issues . . . (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the

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[19]Motions for reconsideration in bankruptcy cases generally must be filed within the ten day period provided for in Rule 59 of the Federal Rules of Civil Procedure. See In re Northeast Mgmt. Servs., Inc., 267 B.R. 492, 494 (N.D.N.Y. 2001) (stating that a "motion for reconsideration is, as a practical matter, a motion for amendment of judgment under Fed. R. Civ. P. 59(e)"). At the same time, Bankruptcy Rule 9024 appears only to require that motions for reconsideration of a decision to disallow a claim must be filed within the one-year time limit provided by Rule 60(b). Section 502(j) provides no time limit for such motions. The McDuffys' motion appears to have been timely filed under any of these standards.

> court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
> . . .
>
> (2) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59.

Bankruptcy Rule 3008 pertains to reconsideration, providing that "[a] party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate."[20] Reconsideration under Rule 3008 is discretionary with the court. See Fed. R. Bankr. P. 3008, Advisory Committee Note (1983).

Finally, under 11 U.S.C. § 502(j), "[a] claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case." In determining whether there is cause under § 502(j) to reconsider a disallowance of a claim, courts look to the factors set forth in Rule 60(b) of the Federal Rules of Civil Procedure. See In re Johansmeyer, 231 B.R. 467, 470 (E.D.N.Y. 1999). That rule states,

> On motion . . ., the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time . . .; (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

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[20]There is no dispute that the McDuffys are parties in interest.

As stated above, the bankruptcy court denied the McDuffys' motion for rehearing, a new trial, transfer, and stay. The McDuffys contended that reconsideration, a new trial, transfer, and a stay were warranted for several reasons. Most, however, had already been addressed by the bankruptcy court. To the extent that the McDuffys argue the bankruptcy court erred in failing to consider the preclusion issues discussed, the Court concludes that those doctrines are inapplicable and therefore reconsideration was not appropriate.

The McDuffys also contend that the trustee committed several procedural violations which resulting in their being deprived of a fair trial, and they argued that the bankruptcy court should reconsider its opinion on this basis.[21] First, they maintain that the trustee failed to adhere to the requirements of the pretrial order, serving them with documents later than was required under the pretrial order and failing to designate witnesses until shortly prior to the commencement of trial. As a result, they argue, they were forced to submit their own memoranda beyond the appropriate deadline, a fact about which the trustee complained at trial. Second, the McDuffys contend that the trustee unreasonably requested that they renumber their trial exhibits. In sum, the McDuffys maintain that the trustee's actions were designed to "trick" them into performing at standards required of attorneys rather than pro se litigants. The Court concludes, however, that the procedural violations of which the McDuffys complain did not warrant reconsideration, reargument, a new trial, or transfer, and thus that the bankruptcy court did not abuse its discretion in denying their motion.

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[21]The McDuffys make this argument in several places throughout their briefs. Given that these issues apparently were raised to the bankruptcy court in their motion for reconsideration, the Court will consider them in that context.

The McDuffys also address an evidentiary objection made at trial. (Doc. # 12, Ex. AAA, at 11-13.) Specifically, they appear to argue that the bankruptcy court erred in allowing counsel for the trustee to refresh Mrs. McDuffy's recollection with documents relating to complaints made against Attorney Allard that were not admitted into evidence and not shown to the McDuffys before trial. (Doc. # 12, Ex. DDD, Tr. of Nov. 21, 2000 hearing, at 118-23.) It is well-settled that a document need not be in evidence to be used to refresh a witness's recollection under Fed. R. Evid. 612.[22]

V. Conclusion

For the foregoing reasons, the order of the bankruptcy court is AFFIRMED and the Clerk is directed to close this case.

SO ORDERED this _____ day of July 2002 at Hartford, Connecticut.

_____
Christopher F. Droney
United States District Judge

[22]The McDuffys also maintain that it is unfair to continue the stay in McDuffy II. The McDuffys, however, did not indicate in their Notice of Appeal that they intended to appeal the bankruptcy court's denial of their request to lift the automatic stay. While they did refer to the stay in their "Motion for Rehearing," which was listed as a basis for this appeal, that motion does not appear to have been directed at the stay.